



State of West Virginia  
Office of the Attorney General

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Erica L. Boggess  
Executive Director  
West Virginia Housing Development Fund  
5710 MacCorkle Ave., SE  
Charleston, WV 25304

Dear Ms. Boggess:

On behalf of the West Virginia Housing Development Fund (the "Fund"), you have asked for an Opinion of the Attorney General about whether the Fund is the only public housing authority ("PHA") authorized to operate throughout West Virginia. This Opinion is being issued pursuant to West Virginia Code Section 5-3-1, which provides that the Attorney General "shall give written opinions . . . upon questions of law, whenever required to do so, in writing, by . . . [any] state officer, board or commission." To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

In your letter, you explain that in 2000, the United States Department of Housing and Urban Development ("HUD") began outsourcing Project-Based Section 8 Assistant Payment Contracts to qualified PHAs, which then act as Performance Based Contract Administrators ("PBCAs"). HUD awarded the Fund a contract that same year to serve as a PBCA in West Virginia, a role in which the Fund continues to serve. In 2012, HUD began revising the bidding process for PBCAs, and you were concerned that HUD might contract with regional or national contractors to serve as PBCAs in West Virginia under the updated procedures. In 2012 and 2013, our Office advised the Fund that local and regional authorities are not authorized to be PBCAs consistent with West Virginia law, and that the Fund was the only entity in the State authorized to administer a PBCA contract at that time. Seven years later similar concerns have arisen.

Your letter raises the following legal questions:

- (1) *Is the Fund the only West Virginia PHA authorized to serve as a PBCA for West Virginia?*
- (2) *Are out-of-state entities authorized to serve as PBCAs in West Virginia?*

With respect to the first question, none of the relevant laws have changed since 2013 and we accordingly reaffirm our previous conclusion that the Fund is the only PHA authorized to serve as a PBCA in West Virginia. The answer to the second question follows from the same principles, and we conclude that out-of-state entities are not authorized to serve as PBCAs in West Virginia.

### ***Discussion***

Congress enacted the Housing Act of 1937 (“Housing Act”) to assist States in providing aid for public housing. *See* 42 U.S.C. § 1437. The Housing Act authorizes the Secretary of HUD to “enter into annual contributions contracts with [PHAs] pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units.” *Id.* § 1440(a).

The Housing Act defines a PHA, in turn, as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing.” 42 U.S.C. § 1437a(b)(6)(A). For purposes of administering the Section 8 housing program and as relevant to your request, this definition includes “consortia” of PHAs that, in the Secretary’s view, have “the capacity and capability to administer” Section 8 housing, as well as “any other entity” the Secretary may contract with in an area in “which no public housing agency has been organized or where the Secretary determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance.” *Id.* § 1437a(b)(6)(B).

HUD further requires PHAs applying to serve as PBCAs to be governmental entities or instrumentalities. *See* U.S. Dep’t of Hous. & Urban Dev., Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistant Payments (HAP) Contracts, at § 2.3 [hereinafter HUD Invitation] *available at* <https://www.hud.gov/sites/documents/INVITATIONFORAPPSFINAL.PDF>. A “governmental entity” is defined as a public entity with statewide scope: The term includes an entity “created under a statute that explicitly authorizes the entity to operate throughout the entire state in which the entity proposes to serve as PBCA or that evidences a legislative intent for such entity to have such authority.” *Id.* § 2.4(3). And a “governmental instrumentality” must have a parent entity that is authorized by statute to operate as a PHA throughout the State in which the instrumentality proposes to serve as a PBCA. *Id.* § 2.5.

These definitions make clear that statutory authority to operate throughout the entire State in question—for the PHA itself or for its parent entity—is necessary to serve as a PBCA. The Fund is the only entity in West Virginia that satisfies this requirement. And there are no entities

outside West Virginia that possess statutory authority to operate as housing authorities throughout the entire State, either.

*First*, the Fund is the only West Virginia entity qualified to be a PBCA. West Virginia law “provide[s]” for (but does not require) local governing bodies to create local PHAs through resolution. W. Va. Code § 16-15-3(a); *Teller v. McCoy*, 162 W. Va. 367, 377, 253 S.E.2d 114, 121 (1978). Local PHAs are empowered to carry out state housing laws through a variety of means, including constructing, repairing, purchasing, or leasing a development, and the Code makes clear that they may serve as agents for the federal government. *Id.* § 16-15-7(a)(4)-(6). They are only authorized, however, to act within their geographic boundaries. *See id.* § 16-15-7b. And while local PHAs may consolidate and form a regional PHA, *id.* § 16-15-3b, the regional PHA’s authority is generally limited to the geographical boundaries of the participating PHAs; the only exceptions are where another local PHA consents to allow the regional PHA to operate in its sphere, or if there is no local PHA in the area where the regional PHA seeks to operate. *Id.* § 16-15-7b.

By contrast, the Fund is created under a separate section of the Code—Section 31-18-2(h)—which provides:

[T]he West Virginia housing development fund, heretofore created and established by this article, is acting in all respects for the benefit of the people of the state of West Virginia to serve a public purpose in improving and otherwise promoting their health, welfare and prosperity, and that the West Virginia housing development fund, heretofore created and established, is empowered, hereby, to act on behalf of the state of West Virginia and its people in serving this public purpose for the benefit of the general public.

W. Va. Code § 31-18-2(h). Section 31-18-6(x)(31) further empowers the Fund “[t]o exercise all of the rights, powers, and authorities of” local PHAs “in any area or areas of the state.”

These statutes make clear that the Fund is authorized by state law to operate throughout the entire State of West Virginia. It thus qualifies as a governmental entity under HUD’s requirements for serving as a PBCA in West Virginia. Because local PHAs are not authorized by statute to operate statewide, however, they do not qualify. Nor does joining together as regional PHAs alter the outcome: While the Secretary has discretion to treat a consortium of local entities as a PHA for purposes of administering Section 8 housing programs, 42 U.S.C. § 1437a(b)(6)(B)(i), the consortium would still fail HUD’s requirement to be authorized by statute to operate statewide. *See* HUD Invitation at § 2.6. It is theoretically possible for all local PHAs in West Virginia to consolidate—and thus combine their individual spheres of authority—but this scenario is unlikely and may frustrate the Legislature’s purpose in creating the Fund. In any event, there is no indication that such a *de facto* statewide PHA exists.

Similarly, local or regional PHAs cannot qualify as governmental instrumentalities, which need not have statewide authority to operate as long as their parent entity does. These local and regional entities are not instrumentalities of the Fund; state law makes clear that their parent

entities are the local governing bodies that created them. *See* W. Va. Code §§ 16-15-3(a), 31-18-2(h).

*Second*, there are no out-of-state entities authorized to serve as PBCAs in West Virginia. An out-of-state entity would not satisfy the threshold definition of a PHA for purposes of administering Section 8 housing programs in West Virginia, much less the requirements of a PBCA. A PHA must be “authorized” to administer public housing. *See* 42 U.S.C. § 1437a(b)(6)(A). No provision of the West Virginia Code authorizes any out-of-state entity to do so in West Virginia; the only PHAs mentioned in the Code are the Fund and local PHAs. And even if an out-of-state entity were authorized to administer public housing in another State, that authority would not be extraterritorial. *Cf. Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (explaining that one State’s attempt “to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power” (citation omitted)). Further, the exception for recognizing entities as PHAs in areas where there is no PHA or the local entities are not willing or able to assist in administering public housing, 42 U.S.C. § 1437a(b)(6)(B)(iii), does not apply here as the Fund operates statewide in West Virginia.

Out-of-state entities also cannot satisfy the requirements to serve as PBCAs because they are not statutorily authorized to operate statewide, nor instrumentalities of a parent entity that possesses this authority. As already mentioned, the West Virginia Code does not expressly authorize out-of-state PHAs to operate anywhere in the State, much less everywhere. And while the Housing Act includes out-of-state entities in the definition of PHA for Section 8 housing programs, it does not confer any authority on them that state law withholds. *See* 42 U.S.C. § 1437a(b)(6)(B)(ii)-(iii). They are thus not governmental entities. The only potential exception would be if an out-of-state entity satisfied the instrumentality test by contracting with the Fund to provide services in the State. Nothing you have provided to our Office suggests this is the case.

In sum, the Fund is the only entity authorized by statute to operate as a PHA statewide in West Virginia. As such, absent a contract with an out-of-state entity or local or regional PHA, it remains the only entity that meets HUD’s requirements to serve as a PBCA in West Virginia to administer the Section 8 housing program.

Sincerely,



Patrick Morrissey  
Attorney General

Lindsay See  
Solicitor General

Steven Travis  
Deputy General Counsel